Supreme Court, U.S.
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No. 06-1080

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In The
Supreme Court of the United States

CHAD PATRICK O'HANDLEY

Petitioner-Appellant,

v.

GENE M. JOHNSON, DIRECTOR,
VIRGINIA DEPARTMENT OF CORRECTIONS

Respondent-Appellee.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI WITH APPENDIX

Laurence Bragg
Counsel of Record
GOSS & FENTRESS
735 Newton Road
Suite 100
Norfolk, VA 23502
(757) 466-1095

Counsel for Petitioner

THE LEX GROUP^{DC} ♦ 1750 K Street N.W. ♦ Suite 475 ♦ Washington, DC 20006
(202) 955-0001 ♦ (800) 815-3791 ♦ Fax: (202) 955-0022 ♦ www.thelexgroupdc.com

QUESTIONS PRESENTED

I. Was the petitioner's sixth amendment right to counsel violated when trial counsel failed to investigate evidence, call critical witnesses, or adequately prepare for cross examination and sentencing?

II. Did the lower courts abuse their discretion by dismissing this habeas corpus petition without ordering an evidentiary hearing on allegations of ineffective assistance of trial counsel?

III. Does the statute of limitations apply to this case, where the Petitioner asserts that he is actually innocent of the crimes for which he has been convicted?

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CITATION TO OFFICIAL/UNOFFICIAL REPORTS OF OPINIONS/ORDERS

The Order of the United States Court of Appeals for the Fourth Circuit denying the Petition for Rehearing was entered October 10, 2006. App., infra, 33a. The Unpublished Opinion of the United States Court of Appeals for the Fourth Circuit was entered August 30, 2006. App., infra, 1a. The Final Order of the United States District Court for the Eastern District of Virginia was entered March 14, 2006. App., infra. 5a.

JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES, ORDINANCES, AND REGULATIONS

U.S. CONST. amend V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of

the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT OF THE CASE

Chad Patrick O'Handley was indicted on November 6, 2000 by a grand jury for the City of Hampton and charged with Murder in violation of § 18.2-32 and Robbery in violation of § 18.2-58. O'Handley was tried by a jury on February 5 and 6, 2001, at which time he was convicted of Robbery and Second Degree Murder. Following the sentencing phase of his trial, O'Handley was sentenced to 30 years on the Robbery indictment and 40 years on the Second Degree Murder indictment. A Pre-Sentence report was requested, and a sentencing hearing was conducted on April 17, 2001, at which time the trial court affirmed the jury's sentence. Notice of Appeal was filed on May 11, 2001.

By memorandum opinion dated November 13, 2001, a single judge of the Court of Appeals denied O'Handley's Petition for Appeal. O'Handley requested review by a three judge panel. On April 12, 2002, a three judge panel denied O'Handley's Petition for reasons set forth in the November 13, 2001 order. O'Handley Petitioned for Appeal to the Supreme Court of Virginia, which denied same by a Ruling dated July 26, 2002. Then, O'Handley submitted his Habeas Corpus Petition to the Hampton Circuit Court, which denied same by Ruling dated October 9, 2003, and to the Virginia Supreme Court, which denied same by Ruling dated June 28, 2004. O'Handley proceeded with his Habeas Corpus Petition to the United States District Court, which denied

same by a Final Order entered March 14, 2006, and to the United States Court of Appeals for the Fourth Circuit, which denied same by Unpublished Opinion entered August 30, 2006. O'Handley Petitioned for Rehearing at the United States Court of Appeals for the Fourth Circuit, which was denied by Order entered October 10, 2006.

ARGUMENT

I. DEFENSE COUNSEL FAILED TO PRESENT JON WOLFORD'S TESTIMONY OR STATEMENTS AT TRIAL.

The failure to investigate and/or present witness evidence may constitute ineffective assistance of counsel which so prejudices the petitioner's case that the error creates a "reasonable probability" the result of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984).

The Petitioner received a jury trial on the charges of murder and robbery of Shawn Mabry, which was tried on February 5 and 6 of 2001. At trial, the Petitioner's defense was that he acted in defense of his infant son, Noah O'Handley; and, the Petitioner asserted that he never robbed Mabry. (See: Trial transcripts of February 5 and 6, 2001)

The evidence is uncontested that when the events occurred inside the Petitioner's home (at 210 Point Comfort in Hampton) which caused Mabry's death, there were only four (4) people present: the Petitioner, his infant son Noah, Mabry, and Jon Wolford. (Id.) Noah was too young to comprehend the events or testify; and, Mabry is dead. Therefore, only the Petitioner and Wolford were able to testify. While, the Petitioner testified, Wolford was never called to testify, nor was any

explanation given in the record during the trial to the judge or jury as to why he was not called. (See: Trial transcripts of February 5 and 6, 2001) The first and only mention in the record as to why Wolford was not called to testify did not occur until the Petitioner's sentencing hearing, which was too late to have any impact on the jury's deliberations. (Sentencing Tr. of April 17, 2001 at p. 34)

Throughout the two (2) day jury trial, it was evident that the jury verdict, although able to be supported by the evidence produced at trial, was not a conclusion reached with overwhelming record support. Strickland v. Washington, 466 U.S. 668 (1984). There was no evidence of any incriminating statements made by the Petitioner to the police. (See: Trial transcripts of February 5 and 6, 2001) The only evidence of any alleged inculpatory statements came from a jail-house snitch, one Bobby A. Winfree, Jr., whose testimony is tainted because he was trying to cooperate with the Commonwealth to get out of jail sooner. (Tr. of February 5, 2001 at pp. 221-260)

The Petitioner's trial counsel was timely provided with four (4) statements made by Jon M. Wolford to the police:

1) Statement dated April 1, 2000 (See: Exhibit # 6);

2) Statement dated April 2, 2000 (See: Exhibit # 7);

3) Incident Report of Hampton Police Patrol Officer Robert McCarthy regarding statements made April 3, 2000 (See: Exhibit # 8); and

4) Written statement (undated) which appears to state: "Shawn was at the house and drugs was involved . . . Shawn threatened to kill the baby" (See: Exhibit #9).

In the statement of April 1, 2000, Wolford states that the Petitioner, the Petitioner's son Noah O'Handley, and Wolford were in 210 Point Comfort before Mabry showed up. (See: Exhibit #6 at p.2) Inside the house, Mabry threatened to kill Noah with a knife due to a dispute over a drug debt. (Id. at p. 3, 5). When Mabry threatened Noah, the Petitioner hit Mabry in the head with a fire extinguisher. (Id. at pp.8-9)

In the second statement made on April 2, 2000, Wolford states that Mabry came over to the house, where the Petitioner, Noah, and Wolford are present, asked for money, and threatened to kill the baby with a knife. (See: Exhibit # 7 at p.2) Petitioner then hit Mabry with the fire extinguisher, and, Wolford hit Mabry with the hatchet. (Id. at p.3) After Wolford hit Mabry with the hatchet, Mabry fell to the floor and did not get up. (Id. at p.5) Wolford says Mabry was dead after he hit him with the ax. (Id.)

In the Incident Report of Hampton Police Patrol Officer Robert McCarthy regarding statements made by Wolford on April 3, 2000, McCarthy wrote that Wolford told him it was a bad situation; and, Wolford had to take one life to save another. (See: Exhibit #8)

In Wolford's undated written statement to the police, the writing appears to state: "Shawn was at the house and drugs was involved . . . Shawn threatened to kill the baby". (See: Exhibit #9)

Each of Wolford's four (4) statements, and certainly all of them when considered together, supports the Petitioner's theory of innocence in this case by helping to show that Noah was threatened with a knife by Mabry, that the Petitioner acted in defense of his son, that Wolford delivered at least one blow to Mabry's head with the ax (after which Mabry fell to the floor and did not move any more), and that no robbery of Mabry was contemplated or committed.

Unfortunately for the Petitioner, neither Wolford nor any of his statements to the police were offered as evidence in this trial, nor was any explanation given to the jury as to why the defense did not introduce this evidence. Not until the sentencing hearing on April 17, 2001 did Petitioner's trial counsel attempt to explain on the record why Wolford was not called to testify: "In all likelihood [Wolford is] never going to come to trial. He's incompetent to testify. We couldn't have him here. He will probably die in custody." (Sentencing Tr. of April 17, 2001 at 34)

However, the Petitioner's trial counsel's rationale is incomplete or flawed in several respects. There is no reference in the record or information provided to the Petitioner's present counsel that his trial counsel attempted to meet with Wolford to go over his testimony or otherwise see if Wolford would be able to testify.

Wolford could possibly be unavailable for two reasons. First, he could be incompetent to testify. If so, then the jury should be given evidence or information to explain why Wolford is unavailable. There is no evidence in the record that Petitioner's trial counsel attempted to do this. In fact, there is no evidence in the record that trial counsel sought to ascertain whether Wolford could observe, recollect, and communicate the facts in question. Helge v. Carr, 212 Va. 485, 184 S.E.2d 794 (1971).

Wolford was never observed or questioned by the Court; and, no expert testimony or psychiatric evaluations are present in the record or other information provided to the Petitioner's present counsel to make a competency determination. Id.

Second, Wolford could assert his Fifth Amendment right against self-incrimination. Despite invoking his right to silence, the previous statements made by Wolford to the police can be admitted into evidence under the hearsay exception for admission against interest since the declarant would be unavailable to testify, the statements are against the declarant's penal interest, and the statements are reliable. Chandler v. Commonwealth, 249 Va. 270, 455 S.E.2d 219 (1995). (See: Exhibits #6, #7, #8, #9; §§ 18.2-31, 18.2-32, and 18.2-58 of the Code of Virginia, 1950, as amended). The reliability of Wolford's statements is buttressed by other physical evidence and testimony in the case, including but not limited to Mabry's autopsy (See: Exhibit #10), and other witnesses' testimony. (See: Exhibits ## 2-4)

There is a "reasonable probability" that Wolford's statements, if presented at trial, would cause the result of the trial to be different.

II. DEFENSE COUNSEL FAILED TO INVESTIGATE, PRESENT, EMPHASIZE, OR ARGUE EVIDENCE CRITICAL FOR THE DEFENSE AT TRIAL.

Appropriate investigation, both factual and legal, to determine if matters of defense can be developed in support of an accused's case are part of the minimum standard of care and effectiveness required of an attorney. Sneed v. Smith, 670 F.2d 1348 (4th Cir. 1982); Strickland v. Washington, 466 U.S. 668 (1984); Sallie v. North Carolina, 587 F.2d 636 (4th Cir. 1978). The degree

of pretrial investigation that is reasonable depends on many factors, including the number and complexity of issues, the strength of the prosecutor's case, and the overall strategy of counsel. Murray v. Griffith, 243 Va. 384,416 S.E.2d 219 (1992). The standard for evaluating the adequacy of representation by defense counsel requires that all decisions materially affecting a defendant's representation be the product of informed judgment, not neglect or ignorance. Sallie v. North Carolina, supra; Marzullo v. Maryland, 561 F.2d 540 (4th Cir. 1977).

A. Counsel failed to use DNA evidence that would have supported petitioners argument.

Certificate of Analysis FS Lab # T00-3252, dated October 16, 2000, together with the Case Supplemental Report regarding evidence collection done on March 31, 2000, confirm that a typed letter found inside the residence at 210 Point Comfort (from the northeast bedroom floor) had blood on it from both Noah O'Handley and Mabry. (See: Exhibits #11 and #13, respectively) Specifically, DNA obtained from the letter (designated as "Item 15" in the Certificate) is consistent with a mixture of DNA profiles from Noah O'Handley and Mabry. (Exhibit #12 confirmed the fluid was blood from which the DNA profiles we extracted.) Neither the Certificates dated August 1, 2000 or October 16, 2000, nor the Case Supplemental Reports of March 31, 2000 or April 18, 2000, were moved into evidence or presented to the jury.

The contents of the Certificate dated October 16, 2000 is significant because it supports the Petitioner's defense in two ways. First, it shows that, at some point, Noah was injured seriously enough to cause him to bleed. Second, the presence of Noah's blood with Mabry's blood

strongly infers that Noah and Mabry were injured at, or close to, the same time and place.

Throughout the Petitioner's defense at trial, there was no physical evidence introduced to show that Noah was injured as the Petitioner and his fiancée, Angela Wolford, stated. (Tr. of February 5, 2001 at pp. 146-173; Tr. of February 6, 2001 at pp. 27-28, 42-44) Pictures of Noah's face taken some time after the date of this killing show no significant injury or scarring to Noah. (Tr. of February 5, 2001 at pp. 333-335) The only piece of evidence recovered at the scene showing Noah bled was the letter found on the floor of the Northeast bedroom. Thus, showing that Noah's and Mabry's blood was together on this letter is a crucial piece of physical evidence that supports the Petitioner's contention that he acted in defense of his infant son Noah, who was threatened and cut with a knife by Mabry. This piece of physical evidence alone may have raised a reasonable doubt of guilt on the murder and robbery charges; and, present counsel is unaware of any strategy which would have helped the Petitioner's cause by not introducing this evidence.

In its case-in chief at trial, the Commonwealth called Forensic Scientist Jerry Sellers (Tr. of February 5, 2001 at pp. 203-220), and directed his attention to the analysis of evidence contained in the Certificate dated August 1, 2000. (See: Exhibit #12) Specifically, Sellers was asked the following leading question, to which he answered "Yes" (and to which the Petitioner's trial counsel should have objected because the prosecutor was leading his own witness; see: Berger, Belton, and Stoots, infra):

> "Is it fair to say that the items of evidence that showed consistent with the DNA of Shawn Mabry, the victim, was . . . an axe, a dog leash, a clock

radio, and some blood swabs that were taken from around the house?" (Tr. of February 5, 2001 at p. 208)

So, in this leading question about the DNA findings, the Commonwealth established that Mabry's blood was found inside the house at 210 Point Comfort and on the weapon (used by Wolford). Following Sellers' testimony, the Commonwealth had no need to introduce either of the two (2) certificates into evidence. The Petitioner's trial counsel never asked whether Noah's blood was found on any of the items recovered. (Id. at pp. 215-220)

B. Counsel failed to investigate unidentified DNA evidence.

Additionally, it does not appear in the record or other information possessed by the Petitioner's present counsel that any request was ever made to have the leather leash, the box, or the fire extinguisher tested to determine if the unidentified DNA evidence found on those items belongs to Noah O'Handley. (See: Exhibit #12) Obviously, the more items Noah's blood is found on, the more serious the injury, the more sever the threat to Noah's life or well-being, and the more convincing the claim that the Petitioner acted in defense of his infant child.

Certainly, it can be said that there is a "reasonable probability" that this blood evidence, if presented, would cause the result of the trial to be different.

III. DEFENSE COUNSEL FAILED TO INVESTIGATE OR OBJECT TO IMPROPER EVIDENCE INTRODUCED AT TRIAL.

Failure to object to improper evidence in a state court trial may amount to ineffective assistance of counsel upon which a writ of habeas corpus (seeking a new trial) can be granted. Inge v. Procunier, 758 F.2d 1010 (4th Cir. 1985); Anderson v. Peyton, 209 Va. 798, 167 S.E.2d 111 (1969).

A. The Petitioner's trial counsel did not contest the police's search of the residence at 210 Point Comfort in Hampton.

Mabry's body was discovered March 30, 2000. (Tr. of February 5, 2001 at pp. 53, 59, 65) Photographs were taken and the body and clothing were transported to the Medical Examiner's Office in Norfolk, Virginia. (Id. at p.68) After being identified through fingerprints Sgt. Troy Lyons of the York County Sheriffs Office determined that Mabry had been residing at the Goodwin's house. (Id. at p.76) Lyons went to the Goodwin's house, interviewed Curtis Goodwin, Jr., and Justin Goodwin, and found out the last place Mabry was seen by the Goodwins was at 210 Point Comfort Avenue in Hampton. (Id. at pp. 76-79)

Lyons testified that he began working on a search warrant based on the information provided by the Goodwins in order to search the residence at 210 Point Comfort for evidence involved in the homicide. (Id. at p. 79) Lyons obtained a warrant from a magistrate and The Hampton Police Department executed it. (Id.) Sgt. Lyons was present during the execution of the search warrant. (Id. at p. 80)

The Petitioner's trial counsel was given an opportunity to cross-examine Lyons. (Id. at pp. 80-82) There is no indication from the record or any of the information provided by trial counsel to the Petitioner's present counsel that trial counsel ever received a copy of that search warrant (or any other search warrant pertaining to this case); and, trial counsel never asked any questions in the record regarding the contents of the search warrant or how it was executed. Apparently, a copy of the search warrant was never provided to trial counsel when the Commonwealth gave him the other discovery materials; and, trial counsel made no specific request to be provided with a copy of the search warrant after not receiving a copy with the other discovery materials. So, there appears to be no investigation done by trial counsel to determine the validity of the search warrant.

If there was no search warrant, the search warrant was invalid, or it was executed improperly, then the evidence recovered as a result of the search may have been seized illegally. If the evidence was seized illegally, then it is not admissible at trial. Unfortunately, there is not enough information by way of testimony in the trail transcripts to determine what facts were asserted in the search warrant, or how it was executed.

On March 31, 2000, David Bounds, Jr., a Hampton Police Department Crime Scene Technician, went to the Petitioner's house at 210 Point Comfort, where he went inside and found, photographed, and seized evidence. (Tr. of February 5, 2001 at pp. 184-203) Jon Wolford was present. (Id. at p.202) It is unknown from the record or other information provided to present counsel whether entry by the police into 210 point Comfort was by way of search warrant authority, consent to search, or some form of exigent circumstances.

On April 2 and April 3, 2000, Wolford signed three (3) Hampton Police Division Search Warrant Waiver forms, two (2) of which gave consent to search the premises of 210 Point of Comfort (one on April 2, 2000 and one on April 3, 2000), and one of which gave consent on April 3, 2000 to have his blood drawn. (See: Exhibits #16, #17, and #18) It is unknown by present counsel whether the Search Warrant Waivers signed two (2) and three (3) days after the initial entry by the police into 210 Point Comfort are relied upon by the police as the authority for their initial entry and search March 31, 2000. There is no information in the record addressing how the consent to search was obtained from Wolford; and, a determination regarding the validity of the consent search cannot be established from the record or other information in present counsel's possession.

Consent is not voluntary if it is given to the police when the police are falsely claiming to have a warrant or when the police are serving an invalid warrant. Deer v. Commonwealth, 17 Va. App. 730, 441 S.E.2d 33 (1994); Crosby v. Commonwealth, 6 Va. App. 193, 367 S.E.2d 730 (1988). Valid consent to search cannot be given after the official conducting the search has asserted that he possesses a search warrant. Sullivan v. Commonwealth, 210 Va. 205, 169 S.E.2d 580 (1969). When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search. Ritter v. Commonwealth, 210 Va. 732, 173 S.E.2d 779 (1970). A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant is invalid. Bumper v. North Carolina, 391 U.S. 543, 88 S. Ct. 1788, 20 L. Ed. 2d 797 (1968); Ritter, supra.

Further, if Wolford was arrested prior to or at the time the search occurred, then a determination should be made whether the arrest was valid. If the arrest was

invalid, then the search of the residence where Wolford stayed may be invalid; and, the arrest carries its own aura of coercion and places a heavy burden on the Commonwealth to show the consent to search was voluntary. McMillon v. Commonwealth, 212 Va. 505, 184 S.E.2d 773 (1971). The burden rests with the Commonwealth to demonstrate the lack of duress. Deer, supra.

Also, no inquiry was made by trial counsel into the competency of Wolford to understand or enter an agreement to give consent to search, or whether the police knew Wolford was incompetent. See: Helge v. Carr, supra. If Wolford's level of incompetence is so high that he cannot be tried for his participation in a crime (Sentencing Tr. of April 17,2001 at p. 34), then he is not capable of voluntarily entering an agreement to consent to search. If the police knew Wolford was incompetent, then that is a compounding factor pointing toward intentional coercion by the police.

A court must determine in light of the totality of the circumstances, including not only the details of the encounter with the police, but also the characteristics of the person solicited by the police to give consent to search, whether the consent was the product of an essentially free and unconstrained choice by its maker, or whether the maker's will was overcome and his capacity for self-determination critically impaired. Godwin v. Commonwealth, 3 Va. App. 249, 349 S.E.2d 161 (1986). The mental retardation of the person from whom consent is sought is one factor to consider in making the determination whether the consent was voluntary. Id. The incompetent person may be abnormally susceptible to coercion and pressure, and may consent out of a desire to please someone perceived to be an authority figure, or may be incapable of understanding the ramifications of a consent search and his right not to consent. Id. An

appellate court must make an independent evaluation of the evidence to determine whether the consent was voluntary. Id. However, since Wolford did not testify and there is no other evidence in the record bearing on this issue, there is no evidence for the reviewing court to rely upon to evaluate the ultimate issue of voluntariness. Id.

The failure of defense counsel to raise any objection to the use of evidence obtained from the search of a residence raises a serious problem. Sallie v. North Carolina, supra at p. 640. The Fourth Circuit Court of Appeals would think it standard practice that defense counsel investigate the circumstances of any search and raise all possible objections to the admission of evidence obtained from it. Id.

A motion to suppress concerning all of these issues should have been made by trial counsel; and, rulings thereon should have been determined by the trial court well in advance of trial. There is a "reasonable probability" that this evidence, if presented, would cause the result of the trial to be different.

B. The Petitioner's trial counsel failed to object to numerous leading questions asked by the Commonwealth of one Angela Wolford, a witness of the Commonwealth's own calling.

Where the prosecutor calls a witness in its case, and that witness is not declared to be hostile or adverse, it is improper for the prosecutor to propound leading questions. Berger v. Commonwealth, 217 Va. 332, 228 S.E.2d 559 (1976); Belton v. Commonwealth, 200 Va. 5,104 S.E.2d 1 (1958). It is the defense attorney's duty to make timely objections to the improper leading questions. Berger, supra. Otherwise, inadmissible testimony that is prejudicial to the Defendant's case may get before the

jury. Stoots v. Commonwealth, 192 Va. 857, 66 S.E.2d 866 (1951).

The Commonwealth called Angela Wolford as a witness in its case-in-chief. (Tr. of February 5, 2001 at pp. 140-168) Angela was never declared a hostile or adverse witness, and was never made a court's witness. As such, the Commonwealth should not have been allowed to lead its own witness by asking numerous leading questions that suggested answers detrimental and prejudicial to the Petitioner's case. However, the Petitioner's trial counsel did not object; therefore, testimony got before the jury which might otherwise have been inadmissible.

In a series of leading questions, the Commonwealth got Angela to agree to numerous suggested answers which were cumulatively detrimental to the Petitioner at trial. (Id. at pp. 151-2, 162-8, 179-82)

In the course of the prosecutor's questioning, most of which was leading, Angela was asked numerous questions to which she did not know the answer; but, without any timely objection by the Petitioner's trial counsel, she answered questions with what was her assumption, what was her impression, and what was probable. (Id. at pp. 151, 154, 159, 161, 165-6)

To the extent that she was asked leading questions to which she had no personal knowledge of the answer, the Petitioner's trial counsel should have objected to these "assumed" answers which were cumulatively detrimental to the Petitioner's case.

The Petitioner concedes that this failure to object to leading questions and "assumed" answers alone is not enough to require a new trial; however, it is a circumstance to consider in combination with the other

issues indicating ineffective assistance of counsel to cumulatively compel the Petition for Writ of Certiorari.

IV. DEFENSE COUNSEL FAILED TO INVESTIGATE CERTAIN ASPECTS OF THE CASE.

(The Petitioner herein incorporates the case support and argument of paragraph II, including the cases of Sneed, Strickland. Sallie. Murray, and Marzullo, supra.)

A. Trial Counsel was not prepared for cross-examination

The Petitioner's trial counsel did not adequately and diligently prepare for the cross-examination of one Bobby A. Winfree, Jr., which may have lead to earlier discovery by the defense of information not known by the defense until after sentencing (upon receipt of a copy of the letter written by Winfree to one Rob Gagliotti). (See: Exhibit #21)

Winfree was called to testify as a witness for the Commonwealth. (Tr. of February 5, 2001 at pp. 221-227, 233-260) Winfree testified that he and the Petitioner were in the Hampton city jail at the same time; and, during that time, the Petitioner told Winfree he had killed Mabry. (Id. at pp. 236-40) Winfree then detailed what the Petitioner allegedly told him regarding the murder and robbery. (Id. at pp. 241-46) Winfree said he was not expecting any consideration for giving this information to the police. (Id. at p. 226) He has agreed to testify, but has received no consideration or promises or benefit from the prosecutor or his office. (Id. at p. 235) Winfree did ask the prosecutor to appear at his sentencing in Newport News, which the prosecutor did; but, nothing the prosecutor said at the sentencing helped Winfree. (Id.)

The Petitioner's trial counsel cross-examined Winfree. (Id. at pp. 221-226, 249-258) Winfree never admitted receiving any benefit from the police or prosecutor's office regarding his cooperation in this case. At some point prior to Winfree being called as a witness, the Petitioner's trial counsel was given Winfree's statement dated May 12, 2000 and his criminal record. (See: Exhibits #19 and #20, respectively) The Petitioner's present counsel is not aware of any attempts by previous counsel to contact or meet with Winfree prior to trial.

At some date after the trial in this matter was concluded February 6, 2001, the Petitioner's trial counsel received an undated copy of a letter written by Winfree to one Rob Gagliotti. (See: Exhibit #21) (The exact date of receipt of this letter by trial counsel is unknown to present counsel.) Prior to receipt of Winfree's letter to Gagliotti, trial counsel had no knowledge the police "were threatening [Winfree] with about 20 years for conspiracy and contempt if [he] refused to testify against [the Petitioner]." Thus, Winfree's letter to Gagliotti is after-trial discovered evidence which contained information helpful in the cross-examination of Winfree to impeach his testimony on the Petitioner's alleged jail-house confession. And, although trial counsel could have moved the Court for a new trial based on this after-discovered evidence, that motion was never made.

It is the Petitioner's contention that had trial counsel adequately and diligently prepared for the cross-examination of Winfree, trial counsel would have discovered that Winfree was cooperating with the police because the police had threatened him with 20 years for conspiracy and contempt if he refused to testify. It appears from Exhibits #19 and #20 that the identity of Winfree as a Commonwealth's witness against the Petitioner was by no means a secret; and, his whereabouts (in jail) was no secret either. Where trial

counsel fails to interview an important witness in a case, that is a factor to consider in determining whether the Petitioner received ineffective assistance of counsel. Murray, supra.

B. The Petitioner's trial counsel did not adequately and diligently prepare for the jury sentencing phase of trial in failing to discover the mitigating evidence the Petitioner's father would have made known to the jury. (See: Exhibit #22)

Where a defendant is denied effective assistance of counsel at the sentencing phase of trial, the case can be remanded for resentencing. United States v. Burkley, 511 F.2d 47 (4th Cir. 1975). When a defendant is sentenced in the absence of effective assistance of counsel, his sentence must be vacated and reimposed in a proceeding in which any facts in mitigation of punishment may be freely and fully developed. Id. A defendant has a constitutionally protected right to provide mitigating evidence even though his trial counsel either failed to discover it or failed to offer it. (Terry) Williams v. Taylor. 529 U.S. 362 (2000). Where a defendant shows that counsel's performance is deficient in not discovering or offering mitigating evidence for sentencing, and that the deficient performance prejudiced the defendant, then the defendant is entitled to a resentencing hearing. Id.; Strickland v. Washington, 466 U.S. 668 (1984). Where the neglected mitigating evidence is the graphic description of the defendant's childhood, filled with abuse, that evidence might well have influenced the jury's appraisal of his moral culpability. (Terry) Williams v. Taylor, 529 U.S. at 398; See: Boyde v. California, 494 U.S. 370, 387 (1990). This type of mitigating evidence is consistent with the view that the defendant's violent behavior was a compulsive reaction rather than the product of cold-blooded premeditation; therefore, this evidence may lower

the jury's selection of penalty. (Terry) Williams v. Taylor, 529 U.S. at 398.

The Petitioner's father, Michael P. O'Handley, never testified at trial, the jury sentencing phase, or at the Petitioner's formal sentencing hearing on April 17, 2001.

Neither Michael's letter dated April 10, 2001 nor any of the subject matter concerning the Petitioner's abuse was put before the jury in mitigation of the sentence to be imposed. (See: Exhibit #22) The Petitioner's trial attorney should have known prior to and in preparation for trial to contact the people primarily responsible for raising the Petitioner, his biological mother and father, to investigate and determine the mitigating evidence to put before the jury. Former counsel never contacted Michael O'Handley. According to former counsel, he did not find out about the mitigation evidence until he received Michael's letter on April 15, 2001, two (2) days before the Petitioner's formal sentencing hearing. (Sentencing Tr. of April 17, 2001 at p. 31)

In Michael O'Handley's letter to Judge Andrews, Michael states that the Petitioner reacted violently to Mabry's threat to Noah because of the way Michael had raised the Petitioner. (See: Exhibit #22 at p. 1) His reaction was automatic and a direct result of half a lifetime of conditioning. (Id.) From a very young age, the Petitioner had been subjected to a number of emotionally traumatic events and repeated physical abuse at the hands of Michael. (Id.) Michael beat the Petitioner to teach him never to strike anyone else unless he was protecting himself or someone else. (Id. at p. 2) If the Petitioner hit someone while he was not protecting himself or someone else, Michael promised to beat the Petitioner again. (Id.) Adherence to whatever Michael

said would earn the Petitioner accolades and spoiling; but, disobedience or disappointment would earn him a strapping. (Id.) At first, the Petitioner would cry when whipped; but, crying would only get him whipped harder. (Id.) Michael beat the Petitioner badly, causing him to stay home for a few days at a time for fear someone would question his bruises. (Id.)

Michael taught the Petitioner how to fight. (Id.) He was instructed how to totally disable an opponent by reacting immediately and without thinking whenever he or anyone he loved was threatened. (Id.) Should he strike an opponent and the opponent still comes after him, he was to use any method at his disposal to disable them—even if that meant hitting the opponent with a nearby object. (Id. at p.3) Michael praised the Petitioner for getting into a fight with a couple of neighbor boys and breaking one of their noses. (Id.) Michael was under much stress and lost his temper frequently and took it out on the Petitioner on more than one occasion. (Id.)

When Michael was transferred to Germany, his wife and the Petitioner remained behind. (Id.) While Michael was away, the Petitioner was molested. (Id. at pp. 3-4) The Petitioner was never, to Michael's knowledge, seen by a counselor. (Id. at p. 4)

Michael never apologized to the Petitioner for all those years of abuse. (Id.) From what Michael knew about what happened in this case, the immediacy of the reaction, coupled with the use of the nearest object at hand, a fire extinguisher, directed at the other man's face to affect Noah's release, fits perfectly with everything Michael had taught the Petitioner about defending himself. (Id.) There is absolutely no way the Petitioner would have intentionally jeopardized the future of his children through murder, robbery, or otherwise. (Id. at p.5) Had the jury known these facts, at worst their

recommendation would have been at the extreme low end of the sentencing range. (Id.)

This evidence, viewed as a whole and cumulatively with other mitigation evidence presented originally, raises "a reasonable probability that the result of the sentencing proceeding would have been different" if trial counsel had presented and explained the significance of the mitigation evidence offered by Michael O'Handley. (Terry) Williams v. Taylor, 529 U.S. at 399. The Petitioner's defense suffered significant prejudice because this mitigating evidence was not presented to the jury to consider in fashioning an appropriate sentence.

C. Defense counsel failed to timely move the trial court for an order directing the Commonwealth to disclose discovery and inspection

(The Petitioner herein incorporates the case support and argument of paragraphs II and IV, including the cases of Sneed, Strickland, Sallie. Murray, and Marzullo. supra.)

The Petitioner's trial counsel sent the Petitioner's Motion for Discovery and Inspection to the Commonwealth and the trial court by FAX February 4, 2001, the day before trial. (See: Exhibit #23) Without the entry by the trial court of an Order directing the Commonwealth to provide the defense with discovery and exculpatory materials, the Commonwealth's compliance is strictly voluntary. And, the Petitioner's present counsel has no knowledge that any such Order was ever entered with the trial court.

Further, the Petitioner's present counsel is unable from the record or other information to determine when or if all discovery and exculpatory materials were

received that the Petitioner was entitled to receive. Without the timely receipt of same by trial counsel, he would not be able to investigate, prepare, present, emphasize, or argue evidence critical for the defense at trial.

Also, it is apparent from the FAX cover letter dated February 4, 2001 that, as of the day before trial, trial counsel had not received at least some of the materials to which the defense should be entitled, to wit: police photographs of Noah; Jencks or Giglio material regarding Curtis Goodwin, Justin Goodwin and Charles Patrick Lovell; and, an updated N.C.I.C. report for Bobby Allison Winfree, Jr. (See: Exhibit #23)

Without knowing when the Petitioner's trial counsel received discovery and exculpatory information, what was received, or whether trial counsel received all the information to which he would have been entitled had an Order been timely entered with the trial court, there is no way to determine (from the record or other documents now in the possession of the Petitioner's present counsel) whether trial counsel's representation of the Petitioner with regard to this issue was effective or not. As such, if the Court is unable to grant the Writ for a new trial from the other issues heretofore espoused, then the Petitioner would request an evidentiary hearing to determine the facts bearing on this issue.

If trial counsel did not receive discovery and exculpatory information in time to adequately prepare, or received less than that to which he should have been entitled, then there may exist a "reasonable probability" that the correction of these errors would cause the result of the trial to be different.

V. STATEMENT OF FACTS AND ARGUMENT IN SUPPORT OF CLAIM OF INSUFFICIENCY OF EVIDENCE

In every criminal charge there inheres the presumption of innocence in favor of the accused. Miller v. Commonwealth, 181 Va. 906, 27 S.E.2d 57 (1943). It remains with him throughout the trial and casts upon the Commonwealth the burden of rebutting it by the production of evidence that will establish the charge beyond reasonable doubt. Id. While the appellate court must consider the sufficiency of the evidence in the light most favorable to the Commonwealth, granting to it all reasonable inferences fairly deductible therefrom, the appellate court cannot on review disregard credible evidence which exculpates a defendant and creates reasonable doubt as to guilt. Harward v. Commonwealth, 5 Va. App. 468, 364 S.E.2d 511 (1988); Grites v. Commonwealth, 9 Va. App. 51, 384 S.E.2d 328 (1989). If the facts of the case are susceptible to two different interpretations, one of which is consistent with the innocence of the accused, then a jury or judge trying the case cannot arbitrarily adopt the interpretation which incriminates the accused. Varker v. Commonwealth, 14 Va. App. 445, 417 S.E.2d 7 (1992). Instead, the interpretation more favorable to the accused should be adopted unless it is untenable under all the facts and circumstances. Id.

In the Petitions for Appeal to the Court of Appeals of Virginia and the Supreme Court of Virginia, argument is made that neither the robbery charge nor the murder charge have been proven beyond a reasonable doubt. (See: Exhibits #24 and #28, respectively) This is so because the evidence offered by the Commonwealth to prove the robbery charge was totally insufficient and not credible of belief; and, there was insufficient proof of malice, without which the murder charge cannot stand.

Simply put, the evidence produced at trial did not prove the Petitioner's guilt to the exclusion of the reasonable hypothesis of innocence that the Petitioner was defending his son Noah from the knife attack by Mabry. (See: Exhibits #2 and #3)

(For the purposes of this Petition for writ of Certiorari, the Petitioner wishes to adopt the facts and arguments presented in Exhibits #24 and #28 in support of this issue regarding the insufficiency of evidence at trial.)

The Petitioner's present counsel submits that but for the ineffective assistance of counsel at trial, the evidence in the record would have been even more compelling to reverse these convictions.

VI. THE LOWER COURTS ABUSED THEIR DISCRETION AND COMMITTED ERROR BY DISMISSING THIS HABEAS CORPUS PETITION WITHOUT ORDERING AN EVIDENTIARY HEARING ON ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

A Circuit Court and the Virginia Supreme Court each has the authority to order an evidentiary hearing in a habeas corpus proceeding to determine whether probable cause exists to believe the petitioner is detained without lawful authority. Code of Virginia § 8.01-654. This authority extends to factual determinations regarding allegations of ineffective assistance of counsel. Yeatts v. Murray, 249 Va. 285, 455 S.E.2d 18 (1995); Sneed v. Smith, supra. The remedy for allegations of unfairness at trial is a hearing in which the petitioner has the opportunity to prove the allegations of unfairness. Smith v. Phillips, 455 U.S. 209 (1982); (Michael) Williams v. Taylor, supra, It is very difficult to

determine whether it "conclusively appears" that a petitioner was provided with effective representation in the absence of an adequate evidentiary hearing. Sneed, supra; United States v. Mandello, 426 F.2d 1021 (4th Cir. 1970). The Fourth Circuit Court of Appeals has stressed the importance of trial counsel's *testimony* (not merely an affidavit) in determining whether the defendant had effective representation. Id.

On this issue, the Petitioner submits that, although the record is adequate to grant the Petition (because the trial record conclusively demonstrates the Petitioner did not have effective representation [Id.]), the record is inadequate to dismiss the Petition without a plenary hearing. However, if this Honorable Court is not inclined to grant this Petition without a hearing on any or all the grounds previously stated, then the Petitioner would request a hearing to resolve all necessary facts for a determination on the issue of effectiveness of counsel, including but not limited to the following:

1. The failure of trial counsel to contest the search of the residence at 210 Point Comfort (The evidence in the record is insufficient to establish the validity of the search.);

2. The failure of trial counsel to make use of Certificate of Analysis FS Lab #T00-3252, dated October 16,2000;

3. The failure of trial counsel to request examination of unidentified DNA found on the leather leash, car board box, and fire extinguisher (all located inside the residence at 210 Point Comfort) to determine if that DNA belonged to Noah O'Handley; and

4. How the discovery process was conducted in this case between the Commonwealth and the Petitioner's trial counsel.

VII. THE STATUTE OF LIMITATIONS DOES NOT APPLY TO THIS CASE BECAUSE THE PETITIONER ASSERTS THAT HE IS ACTUALLY INNOCENT OF THE CRIMES FOR WHICH HE HAS BEEN CONVICTED.

The Petitioner seeks a new trial because he is actually innocent of the crimes for which he has been convicted. The statute of limitations does not apply to cases asserting actual innocence. Schlup v. Delo, 513 U.S. 298 (1995). Innocence of the crime is not limited to the case where the state has convicted the wrong person, but also includes the case where the state has the "right" person; but, he is not guilty of the particular crime with which he is charged. Id.; see also: Sawyer v. Whitley, 505 U.S. 333 (1992). But for the ineffective assistance of trial counsel, evidence would have been introduced at trial to show that either the Petitioner took action in defense of his infant son Noah O'Handley, or Jon Wolford was the person who murdered Shawn Mabry, or both. Either of these explanations, if accepted by a jury, would result in a finding of innocence for the offenses with which the Petitioner is charged.

The evidence in support of the Petitioner's actual innocence is listed in this Petition for Writ of Certiorari, to wit:

A) Failure to call Jon Wolford as a witness, or to present his statements as evidence;

B) Failure to introduce in evidence the Certificate of Analysis FS Lab #T00-3252, dated October

16, 2000, to show a letter at the scene of these offenses was found to have DNA (blood) from both Noah O'Handley and Shawn Mabry on it;

C) Failure to request examination of unidentified DNA (blood) evidence found on other items at the scene of these offenses, which would support the Petitioner's claim of actual innocence; and

D) Ineffectiveness of trial counsel regarding evidence and testimony introduced at trial.

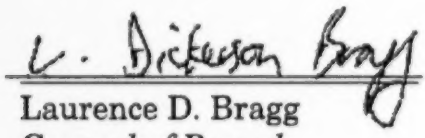
Each of these pieces of evidence, and certainly all this evidence when combined, offers substantial proof of the Petitioner's actual innocence. Where a petitioner asserts that had he received effective assistance of counsel, he would have asserted facts that would have demonstrated his innocence, then that is a matter which should be remanded to the trial court for a determination whether the Petitioner's right to effective assistance of counsel could have changed the outcome and trial. Morris v. California, 966 F.2d 448, 453 (9th Cir. 1991).

Further, under the circumstances of this Petition, application of the statute of limitations does not serve a legitimate purpose. See: Henry v. Mississippi, 379 U.S. 443, 447 (1965); see also: Smart v. Scully, 787 F.2d 816 (2d Cir. 1986); Sena v. New Mexico State Prison, 109 F.3d 652 (10th Cir. 1997). Under the circumstances of this Petition, application of the statute of limitations would create a fundamental miscarriage of justice. Wainwright v. Sykes, 433 U.S. 72, 91, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977); Engle v. Isaac, 456 U.S. 107, 135, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982); Murray v. Carrier, 477 U.S. 478, 106 S. Ct. 2678, 91 L. Ed. 2d 397 (1986); Morris v. California, supra.

CONCLUSION

Based on the forgoing, the Petitioner requests this Court to remand this case for a new trial in Hampton Circuit Court, or in the alternative for a new sentencing hearing, or in the alternative for a plenary hearing(s) to determine whether the Petitioner had adequate representation during trial.

Respectfully Submitted,



Laurence D. Bragg
Counsel of Record
Goss and Fentress
735 Newtown Road, Suite 100
Norfolk, Virginia 23502
(757) 466-1095 (Telephone)
(757) 461-4670 (Facsimile)